No. 87-654

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

NEW ENERGY COMPANY OF INDIANA,
Appellant,

v.

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO, AND SOUTH POINT ETHANOL,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether R.C. 5735.145(B) which is neither an "economic protectionism" provision nor imposes an absolute ban on the sale of out-of-state ethanol in Ohio violates the Commerce Clause by allowing a tax credit for the use of out-of-state ethanol only if the state in which that ethanol is produced grants a similar credit for Ohio ethanol where such provision advances the legislative purpose of protecting the health and safety of its citizens by encouraging the use of non-polluting ethanol.

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Motion to Dismiss or Affirm

Appellee Joanne Limbach, Tax Commissioner of Ohio, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF FACTS

New Energy challenges the constitutionality of R.C. 5735.145(B) which was enacted as part of Am. Sub. S.B. No. 334, which became effective on January 1, 1985. New Energy argues that this reciprocity violates the Commerce Clause (Art. I, Sec. 8, cl. 3) of the United States Constitution.

The qualified fuel credit referred to in R.C. 5735.145(B) is provided by R.C. 5735.145(A) against the motor vehicle fuel tax imposed on motor vehicle fuel dealers. Such dealers are allowed a credit for each gallon of ethanol blended with gasoline in not more than a 10% ratio and used, sold or distributed by dealers in Ohio. The amount of the credit per gallon is based on a statutory formula and varies based upon changes in the federal gasohol credit. R.C. 5735.145(A)(4). The motor vehicle fuel tax is imposed upon and the ethanol tax credit is available solely to motor vehicle fuel dealers, not ethanol producers.

The ethanol tax credit is available not only for Ohio-produced ethanol which is used to create gasohol. It is also available for ethanol produced in any other state which grants similar tax incentives for ethanol use. R.C. 5735.145(B). In fact, at the time the complaint was filed and at the time the reciprocity provision was enacted ethanol produced by every out-of-state producer which competes in the Ohio market, with the sole exception of New Energy, was eligible for the full Ohio tax credit. The evidence established that these out-of-state competitors have the capacity to fully supply that portion of the Ohio ethanol market presently being filled by New Energy should New Energy withdraw from that market. There is nothing in the record to evidence that South Point Ethanol, the only Ohio producer, had the capacity to expand into any void in the Ohio market. The Ohio Court of Appeals found that the evidence indicates that if New Energy left the Ohio market "the primary beneficiaries would be Illinois and Tennessee producers of ethanol. . . ." (Op., at 1124). The record fully supports this finding by the Ohio Court of Appeals. One of the Illinois producers (Archer Daniels Midland "ADM") is the largest and most aggresive producer and it has the full capacity to fill any void in the Ohio market.

Unlike New Energy's assertions which are based solely on assumptions and speculation, the finding of the Qhio Court of Appeals was based on record evidence.

The use of leaded gasoline in motor vehicles is one of the major contributors to air pollution in this country. It is a legitimate goal of both the federal and state governments to reduce the level of pollutants caused by the use of leaded gasoline in motor vehicles. Ethanol is the most cost-effective and environmentally benign replacement for lead in gasoline. It is not disputed that there are major health benefits to the public from replacing lead with ethanol in gasoline. New Energy stipulated to each of these facts.

One of the purposes of the Ohio General Assembly in enacting R.C. 5735.145(B) was to provide a cleaner and safer environment by encouraging the use of ethanol as a substitute for lead in gasoline not only in Ohio but in all states. The Ohio Supreme Court found that R.C. 5735.145(B) was not an "economic protectionism" measure, but rather was intended to effect this legitimate state purpose. It is undisputed that the providing of tax incentives is the best method of encouraging such use. New Energy's president so testified.

The record is devoid of any evidence supporting New Energy's repeated assertion that the sole purpose of R.C. 5735.145(B) was a parochial attempt to protect local ethanol producers against out-of-state competitors. The record fails to establish that this was either the purpose or the effect of the reciprocity provision.

ARGUMENT

R.C. 5735.145(B) IS NOT DISCRIMINATORY IN PURPOSE OR EFFECT AND ANY INCIDENTAL BURDEN ON INTERSTATE COMMERCE IS CLEARLY OUTWEIGHED BY THE LOCAL BENEFITS TO THE HEALTH AND SAFETY OF THE PEOPLE OF OHIO ADVANCED BY THE LEGISLATION. THEREFORE, THE PROVISION DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

1. R.C. 5735.145(B) Is Not An "Economic Protectionism" Provision.

New Energy asserts that R.C. 5735.145(B) discriminates against interstate commerce, thereby violating the Commerce Clause of the United States Constitution. In advancing this argument, New Energy relies on Commerce Clause cases considering statutes inapposite to R.C. 5735.145(B). Because of this misplaced reliance, it is important to note at the outset what R.C. 5735.145(B) does not do. It does not grant a credit solely for Ohio-produced ethanol (unlike the statutes struck down in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) and *Archer Daniels Midland Co. v. State*, 315 N.W. 2d 597 (Minn. Sup. Ct. 1982) ("*ADM MINN.*")). It does not tax the use of ethanol differently depending solely on whether the ethanol was produced in Ohio or out of Ohio (unlike the tax provisions stricken in *Armco, Inc. V. Hardesty*, 467 U.S. 638 (1984), and *National Meat Ass'n. v. Deukmejian*, 743 F. 2d 656 (9th Cir. 1984), *aff.* without opinion, 105 S.Ct. 768 (1985)). Nor does it operate to provide a direct commercial advantage to local ethanol producers over all out-of-state producers (unlike the tax provision declared invalid in *Boston Stock Exchange v. State Tax Comission*, 429 U.S. 318 (1977)).

R.C. 5735.145(B) does not ban the sale of ethanol produced in other states from the Ohio market (unlike the statute stricken in *Philadelphia v. New Jersey*, 437 U.S. 614 (1978)), nor does it ban the sale of products manufactured in other states not having a reciprocal provision from the Ohio market (unlike the statute invalidated in *Great A & P Tea Co. v. Cottrell*, 424 U.S. 366 (1976)).

R.C. 5735.145(B) does not operate in the same manner as any of the statutes involved in any of the cases relied on by New Energy. The statute simply provides that in order for ethanol produced in another state to qualify for the credit available to motor vehicle fuel dealers who use such ethanol in creating gasohol, the state in which the ethanol is produced must also provide similar benefits for ethanol produced in other states.

In considering the Commerce Clause challenge to this enactment the Ohio courts properly rejected the urging by New Energy to expand this Court's holdings in Commerce Clause cases beyond the factual circumstances of those cases. Because each case involving a Commerce Clause challenge requires the delicate balancing of the free trade purpose of the Commerce Clause and the legitimate interests of the states, every Commerce Clause case must turn on the unique characteristics of the statute at issue and the specific facts of each case. *Boston Stock Exchange v. State Tax Commission, supra*, at 329.

The Commerce Clause does not stand as an absolute prohibition against all legislation having an effect on interstate commerce. New Energy's attempt to so color the Commerce Clause, and the cases decided thereunder, is belied by language in those very cases upon which New

Energy relies:

> On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. *E.g., Freeman v. Hewitt, supra,* at 252, 91 L.Ed. 265, 67 S.Ct. 274. This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."

Boston Stock Exchange v. State Tax Commission, supra.

New Energy consciously avoids "the distinction established by this Court between 'protectionist' measures employed by states to favor local businesses and measures employed by states to safeguard the health and safety of their people." *National Meat Ass'n v. Deukmejian, supra,* at 659. It is only "protectionist" measures that are subject to a virtually per se rule of invalidity. Measures employed to safeguard the people of the state which have an incidental effect on interstate commerce "will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

When the chaff is removed from New Energy's Commerce Clause argument what remains is the assertion that R.C. 5735.145(B) is nothing more than simple "economic protectionism" enacted to favor local ethanol producers at

the expense of all out-of-state producers. However, New Energy was required to do more than merely assert that the statute was such a "protectionist" measure—it was required to establish this fact by the presentation of evidence. Each of the Ohio courts properly found that the enactment was not shown factually or legally to constitute "economic protectionism".

A finding that legislation constitutes nothing more than simple "economic protectionism" can be made only if it is demonstrated that it has a discriminatory purpose or a discriminatory effect. *Bacchus Imports, Ltd. v. Dias, supra,* at 270. New Energy failed to meet its burden of establishing the existence of a discriminatory purpose or effect. It presented no evidence regarding the purpose of the General Assembly in enacting R.C. 5735.145(B). It simply jumps to the conclusion that the purpose of the provision was to give a commercial advantage to local manufacturers of ethanol. This conclusion is supported neither by any evidence in the record nor by the face of the statutory provision. Based on the record and the statute, the holding of the Ohio Supreme Court that the enactment had neither a discriminatory purpose or effect is unassailable.

Unlike the Hawaiian statute struck down in *Bacchus* or the Minnesota ethanol credit stricken in *ADM Minn.,* R.C. 5735.145(B) does not grant an exemption only to a locally produced product. In *Bacchus,* it was not disputed that the sole purpose of the exemption for okolehao and pineapple wine was to encourage and promote local industry. 468 U.S., at 270-271. Neither the Hawaiian exemption nor the Minnesota credit was available to the same products produced in any other state.

R.C. 5735.145(B) cannot logically be viewed as an attempt by the Ohio General Assembly to effectuate a discriminatory purpose by providing a commercial advantage to the Ohio-produced ethanol. If that was the desire of the General Assembly, it would have enacted a provision that would restrict any tax credits solely to Ohio-produced ethanol. Rather, the General Assembly enacted R.C. 5735.145(B) which provided a credit for gasohol created with ethanol produced not only in Ohio, but in any other state which granted similar ethanol use incentives.

Because of the vigorous competition among producers involved in the Ohio ethanol market, including large out-of-state producers whose ethanol would qualify under R.C. 5735.145(B), the General Assembly was obviously aware of the fact that enactment of that provision would not give Ohio ethanol manufacturers a commercial advantage. Still, the General Assembly did enact R.C. 5735.145(B). The reason it was enacted is because it was not intended to protect Ohio producers against out-of-state competition, but rather, to effectuate a legitimate state purpose.

It is common knowledge that leaded gasoline is one of the major sources of air pollution in this country. The purpose of the Ohio General Assembly in enacting R.C. 5735.145 was to encourage the use of ethanol as a substitute for lead in gasoline. This purpose clearly advances the health and safety of the citizens of Ohio by providing a cleaner and safer environment. New Energy's repeated arguments below that no public health benefit is served by encouraging the use of ethanol as a substitute for lead in gasoline was belied by the testimony of its own president. Mr. Direnfeld testified that he agreed "that there are major health benefits to the public from the use of ethanol incorporated in gasoline as

opposed to the lead. . . ." (R. 124), and that to encourage the use of ethanol as a substitute for lead in gasoline is a legitimate goal for both the federal and state governments. (R. 124-125). New Energy also stipulated that ethanol was the most environmentally benign replacement for lead in gasoline as well as the most cost effective (R. 20, ¶10).

New Energy attacks the wisdom of the means chosen by the Ohio General Assembly to carry out its purpose of providing a safer environment by arguing that the ethanol produced in a state without a reciprocal credit is no less desireable from a public health standpoint than ethanol produced in a reciprocating state. This misses the point of why the provision is important to the accomplishment of the goal of providing a safer environment.

The goal is not simply to encourage use of ethanol in Ohio, but to encourage its use in other states, particularly those in close geographical proximity to Ohio. Encouragement of the use of ethanol simply by dealers within Ohio would only partially advance the legislative purpose. Unless ethanol is used in other states, including the five states which border Ohio, the purpose of providing a cleaner and safer environment in Ohio would be hindered. A significant number of motor vehicles of nonresidents travel in and through Ohio every day. Additionally, even if these vehicles are not driven in Ohio, they will still pollute the atmosphere which will reach Ohio.

Unless the states in which those residents live also provide incentives for the use of ethanol, it is unlikely that they will use the more environmentally benign ethanol mixture in their vehicles. This is so because, as the testimony of New Energy's president reveals, without both state and federal incentives

ethanol producers cannot compete price-wise with gasoline. If gasohol cannot be priced equal to or less than gasoline its use will obviously suffer. It must be remembered that what is sought to be encouraged is the use of ethanol in not only Ohio but also in the other states. The mere granting of a credit for use of ethanol blended for use in Ohio will do nothing to encourage such use in other states. If the fuel dealers in other states receive no credits for using ethanol, they will not do so because they will not be able to compete with dealers selling lower cost gasoline.

Even assuming that one of the purposes of the enactment was to promote the domestic ethanol industry, that would not by itself render the enactment invalid under the Commerce Clause. This was made clear by a recent statement on the subject by this Court. In *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 876-877 n.6 (1985), this Court recognized that "promotion of local industry is a legitimate state interest in the Commerce Clause context. . . ." The Court reaffirmed that "a state may enact laws pursuant to its police power that have the purpose and effect of encouraging local industry" as long as it does not "impose a discriminatory burden upon the business of other States, *merely* to protect and promote local business." (quoting from *Bacchus*, emphasis added) *Id.* Promotion of the local ethanol industry was clearly not the sole or primary purpose of R.C. 5735.145(B). By its basic nature a reciprocity provision is not designed only or primarily to favor domestic industry against all foreign competition. R.C. 5735.145(B) clearly does not operate in a manner that "gives the home team an advantage by burdening all foreign corporations seeking to do business within the State, no matter what they or their States do." *Id.*, at 878.

Nor has New Energy met its burden of demonstrating that the challenged provision will have a discriminatory effect by causing Ohio-produced ethanol to gain a larger share of the Ohio market at the expense of out-of-state producers. New Energy has simply relied on cases in which the statutes in issue provided credits, exemptions or lower tax rates only for in-state activity. For example, in the *ADM Minn.* case, the statute granted a tax credit only for gasohol made with ethanol distilled in Minnesota and produced by agricultural products grown in Minnesota. No reciprocity was granted to ethanol produced in a state other than Minnesota. The same is true regarding the tax exemption invalidated in *Bacchus.*

Similarly, in *National Meat Association v. Deukmejian, supra*, the statute taxed all out-of-state beef processors and taxed no in-state beef processors. In *Armco,* the gross receipts tax exemption was available only to local manufacturers. The tax provision struck down in *Boston Stock Exchange* imposed a higher tax on security transfers resulting from out-of-state sales than on those resulting from in-state sales. In *Pike v. Bruce Church, Inc., supra,* the statute stricken required cantaloupe growers to pack their cantaloupes in Arizona.

A common thread runs through each of these cases relied on by New Energy: the statutes involved in each case provided an advantage only to local industry which resulted in a direct commercial advantage to such industry at the expense of all out-of-state competitors. This thread of unconstitutionality is not present in R.C. 5735.145(B).

R.C. 5735.145(B) does not operate on its face or in its practical effect to the disadvantage of all out-of-state ethanol

producers. It does not provide a credit for only Ohio-produced ethanol. It is available for ethanol produced in any other state of the union which provides a similar credit or exemption for the use of ethanol. This is not just an appearance of availability designed to abort a Commerce Clause challenge, it is a fact. At the time of the enactment of R.C. 5735.145(B), approximately thirty-two (32) states had some form of ethanol tax credit or exemption, including the state of Illinois where the largest producer of ethanol, ADM, is located. ADM, as well as Peking Energy, which is also located in Illinois, and A.E. Staley, which is located in Tennessee, are all competitors in the Ohio market and ethanol produced by each of these entities is entitled to the Ohio credit.

Because the tax provision involved in the cases relied on by New Energy were available only for local activities, they necessarily had a discriminatory effect against out-of-state activity. They did not operate even-handedly. Unlike those provisions, the Ohio credit is available for the use of out-of-state produced ethanol and is in fact being granted for such use. Therefore, R.C. 5735.145(B) will not necessarily cause Ohio-produced ethanol to acquire a larger share of the market and out-of-state produced ethanol to constitute a smaller share. The fact that the provision may cause a shift in the Ohio market among out-of-state producers does not cause a discrimination against interstate commerce. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981), and *Exxon Corp. v. Maryland*, 437 U.S. 117, 126-127 (1978).

As this Court noted in *Clover Leaf Creamery:*

> We stressed that the Commerce Clause "protects the interstate market, not particular interstate firms

> from prohibitive or burdensome regulations." (quoting from *Exxon Corp.*, 437 U.S., at 127-128).

Under the proper Commerce Clause analysis, in order to meet its burden of demonstrating a discriminatory effect, New Energy was required to establish that the statute will cause locally-produced ethanol to gain a greater share of the Ohio market and ethanol produced out-of-state to constitute a smaller share of the market. *Exxon Corp. v. Maryland, supra,* at 126 n.16. New Energy has failed to prove such an effect.

In fact, rather than demonstrating that the provision will have the effect of favoring the Ohio producer by causing it to gain a greater share of the market, the evidence established just the contrary. Out-of-state ethanol producers whose product is entitled to the Ohio credit when used in a qualified manner by motor vehicle fuel dealers are fully capable of supplying that portion of the Ohio market supplied by New Energy. There is nothing in the record indicating that the sole Ohio producer, South Point Ethanol, would be able to capture any new markets from these out-of-state competitors. What testimony there is indicates that ADM is the largest and most aggressive producer, from which the logical assumption would be that they would be the producer most likely to gain an increased share of the Ohio market if New Energy ceases doing business in Ohio. In fact, New Energy has not even established that the Ohio producer has the capacity to fill any void in the market. Unless it is demonstrated that South Point has the capacity to fill any new market, R.C. 5735.145(B) cannot possibly be found to have a discriminatory effect.

Having correctly determined that R.C. 5735.145(B) did not constitute "economic protectionism" but rather a measure

designed to protect the health and safety of the citizens of Ohio, the Ohio Supreme Court properly balanced the purpose of the Commerce Clause and the legitimate interest of the state in safeguarding the health and safety of its people. Given the significant benefits that will be served by encouraging the use of ethanol and the incidental effect the statute will have on interstate commerce, that Court properly upheld R.C. 5735.145(B).

2. R.C. 5735.145(B) Does Not Impose An Absolute Ban On The Sale Of Ethanol Produced In Other States Regardless Of Whether Such States Grant Incentives To Ohio-Produced Ethanol; Therefore The Enactment Is Not Subject To The Strict Scrutiny Applied To Statutes That Impose Absolute Bans.

The state does not dispute that in applying the Commerce Clause balancing test to determine the validity of a statute the implementation of which will result in an absolute ban on the interstate flow of a product, "[o]nly state interests of substantial importance" will save such a statute. *Great A & P Tea Co. v. Cottrell*, 424 U.S. 366, 375 (1976). Contrary to New Energy's assertion, however, whether a statute imposes an absolute ban is relevant because it is important in applying the balancing test. As the Ohio Supreme Court correctly discerned, in the absence of such a ban the statute is not subjected to the strict scrutiny standard.

It is the absence of such a ban that distinguishes R.C. 5735.145(B) from the provision stricken in *Great A & P Tea Co.*, the major case relied on by New Energy. The Mississippi provision imposed an absolute ban against the distribution of A & P's Louisiana-produced milk products in Mississippi unless Louisiana accepted Mississippi-produced milk on a

reciprocal basis. Unlike the Mississippi reciprocity provision, R.C. 5735.145(B) does not ban any product from the Ohio market. Any ethanol producer is free to sell its product to Ohio dealers. This fact distinguishes that case from the instant one, and the distinction is constitutionally significant because it directly changes the balancing test. Because R.C. 5735.145(B) does not impose an absolute ban, it is not subject to the strict scrutiny applied in *Great A & P Tea Co.*

Additionally, Mississippi's contention that its reciprocity provision served a vital state interest was found by this Court to border on the "frivolous." *Id.* at 375. While Mississippi argued that the provision maintained the State's health standards, the Court found that it in fact disserved this purpose because it would allow out-of-state milk to be distributed in Mississippi even if it was lower than Mississippi's standards as long as the state in which it was produced had entered into a reciprocity agreement with Mississippi. *Id.* In the present case, as the Ohio Supreme Court found, R.C. 5735.145(B) advances a legitimate state purpose, a healthier and safer environment.

As this Court has repeatedly recognized, each commerce Clause case requires a case-by-case analysis balancing the particular state interests involved and the interest in free trade among the states. *Boston Stock Exchange*, 429 U.S., at 329. Because the effect of the absolute ban imposed by the Mississippi statute on interstate commerce was "devastating" and the asserted state interest was found to border on the "frivolous", the balancing weighed heavily against the statute. Unlike the Mississippi statute, any incidental burden on interstate commerce resulting from R.C. 5735.145(B) is clearly outweighed by the very real health and safety benefits advanced by the provision.

The reciprocity provision stricken in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), was also subjected to the "strictest scrutiny" test because it too imposed an absolute ban on the shipment of items in interstate commerce. The statute absolutely prohibited the shipment of water from Nebraska to any state which did not permit its water to be shipped to Nebraska.

Significantly, in *Sporhase*, this Court expressly recognized the difference between economic protectionism and health and safety measures which are at the very core of the state's police power. However, because of the absolute ban imposed by the statute the state was required to show that the provision was narrowly tailored to serve that purpose. Because the Court found that it was not so tailored, the statute did not survive the "strictest scrutiny" test.

Because R.C. 5735.145(B) does not impose a ban on the shipment or sale in Ohio of ethanol produced in any state, it is not subject to the "strictest scrutiny" test. Furthermore, as detailed earlier in this argument, R.C. 5735.145(B) is a health and safety measure and is narrowly tailored to serve the purpose of protecting its citizens by encouraging measures which will directly result in a safer and cleaner environment. Because it is so tailored, the statute could survive the "strictest scrutiny" test, even asuming, *arguendo*, that it was applicable.

The statute at issue in *Baldwin v. G.A.F. Seelig., Inc.*, 294 U.S. 511 (1935), prohibited the sale of out-of-state produced milk in New York unless the price paid to producers was the same as that paid to New York producers. It, like the statutes in *Great A & P Tea Co.* and *Sporhase*, imposed an absolute ban unless other states complied with the statutory requirement. Additionally, the only plausible purpose of the provision was to protect the local milk industry. As such, it was simply an "economic protectionist" measure.

Brown-Forman Distillery v. N.Y. State Liquor Auth., ___ U.S. ___, 106 S.Ct. 2080 (1986), involved a statute virtually identical in effect to that stricken in *Seelig*. The purpose was to directly regulate commerce by regulating activities of businesses in other states. In effect, the statute regulated the price at which these out-of-state distillers could sell their liquor in other states. The failure by those businesses to comply with that regulation could result in the revocation of the distiller's license to sell alcoholic beverages in New York. Simply stated, unless the distiller complied with the New York regulation, it could be absolutely banned from selling its goods in New York. Additionally, as was the statute in *Seelig*, the statute in *Brown-Forman* was found by the Court to be an economic protectionist measure.

Pike v. Bruce Church, Inc., supra, is also inapposite to this case. The statute involved in that case was found to have the effect of forcing growers to move their packing operations to the enacting state by prohibiting a grower from shipping its cantaloupes out of Arizona unless they were packed in Arizona. The Court noted that statutes requiring business operations to be performed in the home state were viewed with particular suspicion and that such a burden on commerce has been considered virtually per se illegal. 397 U.S., at 145.

R.C. 5735.145(B) contains no such requirement. It does not have the effect of forcing ethanol producers to locate in Ohio. In fact, as noted earlier, all of the major competitors other than New Energy continue to sell to Ohio dealers with

no change or shifting in their operations. Additionally, unlike the grower in *Pike*, New Energy is not prohibited from shipping its product into Ohio.

Pike is also distinguishable because of the substantially different local interest sought to be advanced. The primary purpose of the Arizona legislation was to promote and preserve the reputation of Arizona growers, an interest which the Court labeled as "tenuous." 397 U.S., at 145. Balancing this "tenuous" state interest against the burden imposed on interstate commerce by requiring that a grower locate its business within the state, the Court found that the burden on interstate commerce was clearly excessive in relation to the local benefits.

It is particularly noteworthy that this Court distinguished this "tenuous" interest from legislation in the field of health and safety "where the propriety of local regulation has long been recognized." *Id.*, at 143. The Court made it clear that the reason it struck down the legislation was due to the minimal nature of the state interest rather than the extent of the burden on interstate commerce:

> Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best. . . .

Id., at 146.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), is similarly inapposite to this case. Initially, a reading of that decision reveals that there was at least a strong suspicion by the Court that the purpose of the challenged statute prohibiting any labeling containing state quality grades on closed containers of apples shipped into North Carolina was intended solely to give North Carolina growers a competitive edge. Second, the Court found that even if that was not the real purpose of the statute, the asserted purpose of protecting the consumers of the state was in fact disserved by the statute because it deprived them of all information regarding the quality of apples. Because the provision did not advance a legitimate state purpose, or did so only minimaly, the burden on the flow of interstate commerce resulting from the additional repackaging costs and the loss of the competitive advantage Washington apples held in the marketplace was found to outweigh that state interest.

Not only is any incidental burden imposed on interstate commerce by R.C. 5735.145(B) less than that imposed by the Arizona or North Carolina legislation, but Ohio's interest in providing a cleaner and safer environment is a compelling state interest, unlike the tenuous interest of the Arizona legislation or the suspect purpose of the North Carolina statute. Additionally, unlike the statute in *Hunt*, R.C. 5735.145(B) does serve to advance the legitimate state purpose of assuring a safer environment. The burden imposed on interstate commerce by R.C. 5735.145(B) is not excessive in relation to the very real health benefits sought to be obtained by cleaning up the environment. Because the balance falls in favor of the enactment, the Ohio Supreme Court properly upheld R.C. 5735.145(B).

CONCLUSION

For the foregoing reasons, this appellee respectfully submits that the question upon which this case depends is so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by regular United States mail, first-class, postage prepaid, upon Herman Schwartz, Esq., 207 Myers Hall, 4400 Massachusetts Ave., N.W., Washington, D.C. 20016; David J. Young, Esq., Murphey, Young and Smith, 250 East Broad Street, Columbus, Ohio 43215, attorneys for appellant; and David C. Crago, Esq., 1900 Huntington Center, 41 South High Street, Columbus, Ohio 43215, attorney for appellee South Point Ethanol, on this ____ day of December, 1987. All parties required to be served have been served.

RICHARD C. FARRIN
Assistant Attorney General
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